

APPELLATE CIVIL.

1908
February 1.*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.*

FAHMIDA KHANUM (DEFENDANT) v. JAFRI KHANUM (PLAINTIFF).*

Muhammadian law—Shias—Will—Power of devise amongst Shias.

Amongst Muhammadans of the Shia sect a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and such a legacy will be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate it will not be valid to any extent unless the consent of the heirs, given after and not before the death of the testator, has been obtained. *Cherachom Vittil Ayisha Kutti Umah v. Falia Pudiakel Biatlu Umah* (1), *Keramatulnissah Bibee* (2) and *Ranee Khujooroonissa v. Roushun Jehan* (3) referred to.

THIS was a suit brought by one Jafri Khanum against her sister Fahmida Khanum for the partition of a house and certain movable property and for recovery of possession of a half share. In the plaint as originally filed the plaintiff alleged that the house had belonged to Husaini, the deceased father of the parties. The plaint was, however, amended, and it was then alleged that the property in suit belonged to Musammat Muhammadi Khanum, mother of the parties, who died on the 3rd October 1905, leaving her husband Husaini, one son, Kallu, and two daughters; that Kallu died on the 31st January and Husaini on the 7th February 1906; that the property therefore belonged in equal shares to the two daughters, but the defendant had taken exclusive possession thereof on the 25th February 1906. The defendant contended that the amendment of the plaint was improper; that the house had belonged to Husaini, husband of Musammat Muhammadi Khanum, and he had bequeathed the whole of it to the defendant by a will, dated the 2nd February 1906; that the defendant had expended Rs. 300 on Husaini's death ceremonies and that some of the ornaments claimed belonged to the defendant as her own property. The Court of first instance (Munsif of Cawnpore) gave the plaintiff a decree for part of her claim,

* Second Appeal No. 1186 of 1906, from a decree of Bepin Behari Mukerji, Judge of the Court of Small Causes, Cawnpore, exercising the powers of Subordinate Judge, dated the 17th of August 1906, modifying a decree of Raj Behari Lal, officiating Munsif of Cawnpore, dated the 6th of June 1906.

(1) (1865) 2 Mad., H. C. Rep., 350. (2) (1817) 2 Morley's Digest, 120,
(3) (1876) L. R., 3 I. A., 291.

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including one-third of the house and ornaments. Both sides appealed, and these appeals were heard together. The lower appellate Court (Small Cause Court Judge) held that the will set up by the defendant was wholly invalid, and modified the Munsif's decree by giving a decree for one-half instead of one-third of the property in suit. The defendant appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellant.

Munshi *Haribans Sahai*, for the respondent.

STANLEY, C. J., and BURKITT, J.—We think that the decision of the lower appellate Court is correct. It appears to be well settled law that a Muhammadan testator, governed, as in this case, by the Shia School of law, cannot make a valid bequest of all his property to one of his heirs to the exclusion of the other heirs, without the consent of all the heirs obtained subsequent to his death. The legacy in this case included all the testator's property, both movable and immovable, and from the will it appears that he intended to exclude one of his daughters from participation in his estate. The Sunni School agree in holding that a bequest in favour of an heir is invalid, but according to the Shia law it would seem that a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and that such a legacy would be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of all the heirs, given after and not before the death of the testator, has been obtained. Mr. Baillie in his Digest of Muhammadan law, at p. 238, says:—If a person should make a will excluding some of his children from their shares in his succession the exclusion is not valid." Mr. Ameer Ali in his well known work, at p. 486 of the last edition, observes that "the author of the *Sharaya* has laid down that when a testator has excluded one of his children from succession and left the property wholly to others, his direction is entirely invalid and the inheritance will be apportioned among the heirs according to their legal share." Again, Sir Roland Wilson in his Digest of Anglo-Muhammadan Law, after stating the rule that a bequest to an heir (not exceeding the legal third) does not require the assent of the other heirs either before or after the death of

the testator to render it valid, observes:—"The Shia view is certainly the most easy to reconcile with the text of the Koran (II, 178), which recommends the believer to 'bequeath a legacy to his parents and kindred in reason,' " and then, referring to the existence of the difference between the two schools and the doubt which existed on the question, says:—"This, however, was just before the publication of Baillie's translation of the Sharaya, which places the matter beyond doubt." In the latest work on the subject, namely the Institutes of Musalman Law, by Nawab Abdur Rahman, some of the principal texts upon the subject and also authorities are quoted at page 276 and following pages. The learned author of that treatise observes, at p. 278:—"The alienation of one-third to a portion of the heirs will not be legal without the assent of the other heirs subsequently to the death of the testator, because their benefits, already sufficiently secured by the law, are not within the reason of the rule on which testamentary disposition is established, and such a bequest would, as the certain occasion of family dissension, be opposed to public policy." He refers to the case of *Cherachom Vitiil Ayisha Kutti Umah v. Valia Pudiakel Biathu Umah* (1), in which the question is discussed. In another case to which he refers, namely, that of *Keramatu'nissah Bibee* (2) it was held that if a man dispose of his property to his heirs and relations, to one more and to another less, or if he omit any of his relations and after his death the heirs and relations agree to the bequest, the will remains valid, otherwise the will only remains valid as to the bequest made to strangers and invalid for the heirs and blood relations who are to receive their respective shares according to Muhammadan law. See also *Ranee Khujooroonissa v. Roushun Jehan* (3). In view of the authorities we think that the decision arrived at by the Court below was correct and we dismiss the appeal with costs.

Appeal dismissed.

- (1) (1865) 2 Mad., H. C. Rep., 350. (2) (1817) 2 Morley's Digest., 120,
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Before Mr. Justice Banerji, and Mr. Justice Richards.

BABU SINGH AND ANOTHER (DEFENDANTS) v. BIHARI LAL (PLAINTIFF).*

Hindu law—Joint Hindu family—Liability of sons for father's debts—Defence that debts were incurred for immoral purposes—Burden of proof.

According to the Hindu law of the Mitakshara school it is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of a son to pay a personal debt of his father, if the debt be proved, and the son cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the son to discharge. *Maharaj Singh v. Balwant Singh* (1) distinguished. *Kishan Lal v. Garuruddhwaja Prasad Singh* (2) and *Karan Singh v. Bhup Singh* (3) followed. *Nanomi Babuasin v. Modhun Mohun* (4) referred to.

Where, in such a case as above, the son sets up the defence that the debt was incurred for immoral purposes, the burden of proof is on him and not on the creditor. *Debi Dat v. Jadu Rai* (5) followed. *Jamna v. Nain Sukh* (6) dissented from.

And merely general evidence of profligacy on the part of the father is not sufficient. *Chintamanrav Mahendale v. Kashinath* (7) referred to.

THIS was a suit brought by the mortgagee respondents to recover money due upon eight mortgage bonds by sale of the property hypothecated in each bond. There were two brothers, Rup Singh and Mahtab Singh, who formed members of a joint Hindu family. A portion of the family property was recorded in the name of their mother Indar Kunwar, and for this reason she joined her sons in executing some of the bonds. Of the eight bonds in suit two were executed by Mahtab Singh alone; two by Mahtab Singh and Indar Kunwar; one by Rup Singh and Mahtab Singh; another by Rup Singh and Indar Kunwar; another by Rup Singh, Mahtab Singh and Indar Kunwar, and one by Rup Singh and Indar Kunwar. Rup Singh and Mahtab Singh being dead the suit was brought against their sons, who disputed the claim mainly on the ground that the debts in respect of which the eight bonds were executed had been incurred by Rup Singh and Mahtab Singh for immoral purposes, and that the interests of the sons in

* First Appeal No. 283 of 1905 from a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 18th of August 1905.

(1) (1906) I. L. R., 28 All., 508.

(2) (1899) I. L. R., 21 All., 238.

(3) (1904) I. L. R., 27 All., 16.

(4) (1885) I. L. R., 13 Cal., 21.

(5) (1902) I. L. R., 24 All., 459.

(6) (1887) I. L. R., 9 All., 493.

(7) (1889) I. L. R., 14 Bom., 220.

the family property were not therefore liable. This plea was overruled by the Court of first instance (Subordinate Judge of Moradabad), which was of opinion that it had not been proved that the debts were tainted with immorality. That Court accordingly made a decree in favour of the plaintiff. The defendants appealed to the High Court.

Mr. W. Wallach, for the appellants.

The Hon'ble Pandit Sundar Lal and Dr. Tej Bahadur Sapru, for the respondents.

BANERJI and RICHARDS, JJ.—The suit which has given rise to this appeal was brought by the respondent to recover money due upon eight mortgage bonds by sale of the property hypothecated in each bond. There were two brothers, Rup Singh and Mahtab Singh, who formed members of a joint Hindu family. A portion of the family property was recorded in the name of their mother Indar Kunwar and for this reason she joined her sons in executing some of the bonds. Of the eight bonds in suit two were executed by Mahtab Singh alone; two by Mahtab Singh and Indar Kunwar; one by Rup Singh and Mahtab Singh; another by Rup Singh and Indar Kunwar; another by Rup Singh, Mahtab Singh, and Indar Kunwar, and one by Rup Singh and Indar Kunwar. Rup Singh and Mahtab Singh being dead, the suit was brought against their sons, who disputed the claim mainly on the ground that the debts in respect of which the eight bonds were executed had been incurred by Rup Singh and Mahtab Singh for immoral purposes, and that the interests of the sons in the family property were not therefore liable. This plea was overruled by the Court below, which was of opinion that it had not been proved that the debts were tainted with immorality. That Court accordingly made a decree in favour of the plaintiff. It is admitted that the decree as framed is not strictly accurate. It purports to direct the sale of all the property mortgaged in all the eight bonds for the total amount secured by those bonds, whereas the property mortgaged in each bond was liable only for the amount of that bond. This is what the plaintiff claimed in his plaint. The learned advocate for the respondent concedes that in this respect the decree of the Court below must be varied.

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The present appeal has been preferred by the sons of Rup Singh alone. The son of Mahtab Singh has submitted to the decree. It is contended on behalf of the appellants that it has been established that the debts in question were incurred for immoral purposes, except the amount of one bond, namely, that for Rs. 400, dated the 25th of March 1898. In regard to the amount of that bond it has been shown that it was borrowed for payment of Government revenue, which was actually paid, and Mr. *Wallach* fairly concedes that as regards this bond he can urge nothing on behalf of the appellants.

As for the last four bonds, which were executed by Mahtab Singh, and to two of which his mother Indar Kunwar was a party, the son of Mahtab Singh has taken no exception, but, as said above, the decree must be varied to this extent that it should direct that the amount of those bonds should be recovered by sale of the property hypothecated in each of them, so that when the decree is so varied the appellants will have no reason to complain.

There remain then the bond dated the 5th of June 1896 for Rs. 2,400, that dated the 22nd of April 1897 for Rs. 900 and that dated the 25th of April 1897 for Rs. 200. As to these the learned counsel for the appellants contends that it was for the plaintiff to establish that the debts were incurred for family necessities and that the plaintiff made such inquiries as would lead a reasonable man to believe that the money was required for purposes of the family or for payment of antecedent debts which it would be the pious duty of a Hindu son to discharge. For this contention he relies on a recent ruling of a Bench of this Court in *Maharaj Singh v. Balwant Singh* (1), and specially on the following passage in the judgment at page 541:—"We may say in passing that in a case in which a creditor is endeavouring to establish a claim under a simple hypothecation bond given by a Hindu father, having a limited interest only, against his sons, it appears to us to be not unreasonable to require proof on the part of the creditor that before he entered into the transaction he at least made such reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family." With regard to this

(1) (1906) I. L. R., 28 All., 508.

passage it appears to us, and as the head note of the report shows, that it was not necessary for the purposes of that case to decide the question whether the burden of proof lay on the creditor. Furthermore we find that Mr. Justice Burkitt in delivering judgment in the case of *Kishan Lal v. Garurudhwaja Prasad Singh* (1) was clearly of opinion that the onus did not lie on the creditor. At page 240 our learned brother observed:—"Had it been proved that the debt had been contracted for immoral purposes and that the person who advanced the money was aware of the purpose for which it was being borrowed the son would not have been liable. There is, however, not a scrap of evidence to show that the debt which formed the consideration for the bond in suit was contracted for any such purpose." In the Full Bench case of *Karan Singh v. Bhup Singh* (2) the learned Chief Justice in delivering the judgment of the Court stated the law on the subject to be as follows:—"It is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge." We think that this view is in consonance with the rulings of their Lordships of the Privy Council. We need only refer to the following observations of their Lordships in the well known case of *Nanomi Babuasin v. Modhun Mohun* (3):—"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts if not tainted with immorality."

In our judgment the burden of proof lies on the son and not on the creditor, and we are of opinion, in concurrence with the decision in *Debi Dat v. Jadu Rai* (4), that the view taken in the case of *Jamna v. Nain Sukh* (5) can no longer be supported.

(1) (1899) I. L. R., 21 All., 238.

(3) (1885) I. L. R., 13 Cal., 21.

(2) (1904) I. L. R., 27 All., 16.

(4) (1902) I. L. R., 24 All., 459.

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We have carefully considered the evidence in this case. In our opinion it has not been established that the debts in question were incurred for immoral purposes. The bond dated 5th June 1896 for Rs. 2,400 recites that Rs. 2,002-2-0 out of that amount was left with the creditor for payment to one Mohan Lal. It has been fully proved that this payment was actually made, and was made in discharge of prior bonds in favour of Mohan Lal dating as far back as 1889. It was alleged that the debts in favour of Mohan Lal had also been incurred for the purposes of a prostitute in the keeping of Rup Singh. But we find from the evidence of the prostitute herself that she had no connection with Rup Singh when the early debts of Mohan Lal were incurred. We are therefore unable to accept the statements of the witnesses who have deposed that the debts in favour of Mohan Lal had been incurred for purposes of immorality. A prostitute named Nauratan was produced who deposed in regard to Rs. 400, the balance of the amount of the bond for Rs. 2,400, that it was paid over to her. The lower Court disbelieved this witness, and we see no reason to come to a different conclusion as to her credibility. Her statements are too vague to be accepted. On the contrary, Hari Lal, a witness for the plaintiff, proved that this sum of Rs. 400 was appropriated towards family expenses.

As to the bonds for Rs. 900 and Rs. 200, dated respectively 22nd April 1897 and 25th April 1897, they appear to represent one transaction, as both of them were registered on the same date, that is, on the 3rd of May 1897. Nauratan says that Rs. 750 out of the amount of these bonds was paid to her for the expenses of the tonsure ceremony of her son by Rup Singh. She says that this money was paid to her by the plaintiff at the house of Rup Singh at Kanderki. It appears, however, from the endorsement of the Sub-Registrar made on the bonds that at the time of registration Rs. 764 and odd was paid in cash at Moradabad in the office of the Sub-Registrar. The statement of the witness therefore that it was paid to her at Rup Singh's house by the plaintiff is clearly untrue. We have on the other hand evidence to show that the marriage of the daughter of Rup Singh was celebrated about that time, and that the year 1897 being a year of scarcity and famine there was greater necessity for borrowing money

in that year than in other years. The learned Subordinate Judge did not believe the witnesses adduced to prove that all these debts had been incurred for purposes of immorality. He says that they impressed him as being tutored witnesses and partisans of the defendant's friends. We have not the advantage which the learned Subordinate Judge had of hearing the witnesses and seeing their demeanour, and nothing has been shown to us to justify our differing from the conclusion at which he arrived as to the credibility of these witnesses. It is true that there is some general evidence that Rup Singh, and possibly Matab Singh, were profligates. But even if this evidence be believed it is not sufficient, as observed in the case of *Kishan Lal v. Garuruldhwaja Prasad* (1) and in *Chintamanrav Mahendale v. Kashinath* (2) to exonerate the sons of the debtors from their pious duty to pay their father's debts.

For these reasons we are of opinion that the appeal has no force. As we have said in an earlier part of this judgment, the decree of the Court below is not strictly correct and is not in conformity with the prayer contained in the plaint. We therefore vary the decree so far that we direct that the amount of each bond together with costs proportionate to that amount and interest thereon up to the date fixed for payment be realised by sale of the property hypothecated in the bond relating to that amount, and we order that these amounts be calculated and specified in our decree. We extend the time for payment of the decretal amount to the 1st of August 1908. As the rate of interest in some of the bonds was very high, we direct that no further interest shall be charged after the date fixed for payment mentioned above. The respondent will get one half of his costs of this appeal. In other respects we affirm the decree of the Court below.

Decree modified.

(1) (1899) I. L. R., 21 All., 238 at p. 240.

(2) (1889) I. L. R., 14 Bom., 320.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

NARPAT AND ANOTHER (DEFENDANTS) v. RAM SARAN DAS
(PLAINTIFF).*

*Act No. IV of 1882 (Transfer of Property Act), section 68 (c) — Mortgage—
Construction of document—Power of sale in a usufructuary mortgage.*

A mortgage-deed which was primarily usufructuary provided that if the mortgagor failed to deliver possession or if the mortgagee was dispossessed from the mortgaged premises he might recover the amount of the mortgage debt from the mortgagor and the mortgaged property. *Held* that the mortgagee failing to get possession was competent to sue for and obtain a decree for sale of the mortgaged property. *Jafar Husen v. Ranjit Singh* (1) and *Kashi Ram v. Sardar Singh* (2) referred to.

THIS was a suit for sale on a mortgage. The mortgage was primarily a usufructuary mortgage, but contained a provision that if, *inter alia*, the mortgagor did not give possession of the mortgaged property, the mortgagee could recover the mortgage money with interest at Rs. 2 per cent. per mensem from the mortgagor and the mortgaged property. The Court of first instance (First Additional Munsif of Meerut) dismissed the suit, finding that the plaintiff was in possession of the mortgaged property. But on appeal by the plaintiff the Additional District Judge found that the plaintiff was not in possession, and allowing the appeal, gave him a decree for sale. The defendants appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

The Hon'ble Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dave*), for the respondent.

STANLEY, C. J., and BURKITT, J.—We are of opinion that the learned District Judge rightly decided the appeal before him. From a perusal of the mortgage which has given rise to this suit it appears to us that the only reasonable inference to be drawn from it is that the intention of the parties was to provide for the realization of the mortgage debt from the property itself and not merely from its usufruct. The deed in fact was of the nature of a simple mortgage, as well as of a usufructuary mortgage. The case

* Second Appeal No. 4 of 1907 from a decree of Ahmad Ali Khan, Additional Judge of Meerut, dated the 21st of November 1906, reversing a decree of Ram Chandra Chaudhri, Munsif of Meerut, dated the 18th of December 1905.

(1) (1898) I. L. R., 21 All., 4. (2) (1905) I. L. R., 28 All., 157.

in fact resembles more that of *Jafar Husen v. Ranjit Singh* (1) than that of *Kashi Ram v. Sardar Singh* (2). In the first mentioned of these cases the Court came to the conclusion that the intention of the parties was that the debt was realizable by sale of the mortgaged property, whereas in the other case, this Bench was of opinion that the mortgage in suit was merely a usufructuary mortgage. For these reasons we dismiss the appeal with costs.

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Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

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TIKAM SINGH AND ANOTHER (DEFENDANTS) v. KHUBI RAM AND ANOTHER (PLAINTIFFS).*

Lambardar and co-sharer.—Powers of lambardar to deal with coparcenary lands—Lease for seven years.

In the absence of a custom to the contrary a lambardar has no power, without the consent of the co-sharers, to grant a lease of coparcenary land beyond such term as the circumstances of the particular year or season may require. *Chattray v. Nawala* (3) followed. *Mukhta Prasad v. Kamta Singh*, (4) distinguished.

THIS was a suit brought by certain co-sharers in the village for a declaration that a lease executed by defendant No. 4, the lambardar, of 160 bighas odd, cultivatory holding, in the village of Edalpur for a term of seven years was void as against them, on the allegation that the lambardar had acted in excess of his powers in granting the lease, and had done so at an inadequate rental in order to injure the plaintiffs. The Court of first instance (Munsif of Havali, Aligarh) decreed the plaintiffs' claim. The lessees appealed. The lower appellate Court (Additional District Judge of Aligarh) found that the rental was inadequate and the term too long, and accordingly dismissed the appeal and confirmed the Munsif's decree. The defendants lessees thereupon appealed to the High Court.

Babu Parbati Charan Chatterji, for the appellants.

* Second appeal No. 151 of 1907 from a decree of Khetter Mohan Ghosh, second Additional Judge of Aligarh, dated the 8th of November 1906, confirming a decree of Banke Behari Lal, Munsif of Havali, dated the 25th of June 1906.

(1) (1898) I. L. R., 21 All., 4. (3) (1906) I. L. R., 29 All., 20.
(2) (1905) I. L. R., 28 All., 157. (4) Weekly Notes, 1906, p. 277.

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Munshi Gobind Prasad and Munshi Gulzari Lal, for the respondents.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiffs, who are two of the co-sharers of a village, to have a lease executed by the lambardar of the village in favour of the defendants set aside. The defendants are also co-sharers of this village. The lambardar and the other co-sharers were all made parties to the suit. The lease was for a term of seven years, and it is alleged and has been proved that it was made at an inadequate rent.

The Court below set it aside on, amongst other grounds, the ground that a lease by a lambardar for a term of seven years under ordinary circumstances could not be supported. This is a rule which has been acted upon by this Court for a number of years, and was followed by a Bench of this Court in the case of *Chattray v. Nawala* (1). In that case a Bench, of which one of us was a member, held that it was reasonable that a manager should have power to make temporary lettings, but the duties imposed upon him did not seem to admit of his executing in favour of a lessee without the consent of the coparcenary body a lease for a long term of years, and then we pointed out that there was nothing to show that the exigencies of the season or time when the impeached lease was granted required that the grant should be made for so long a term as seven years. This decision followed previous rulings and is in no way inconsistent with the case of *Mukta Prasad v. Kamta Singh* (2). In that case it was held that a lambardar was competent to execute a lease of land for ten years without reference to other co-sharers where the land could not otherwise be let and where it was for the benefit of the co-sharers that the land should be so let. In his judgment in that case Sir Arthur Strachey, C.J., observed as follows:—"It appears that this land is of inferior quality and it contained no pacca well for the purposes of irrigation. Upon the facts found by the Court below it appears that if the lambardar had not executed this lease for ten years, the land would not have been cultivated at all and would have yielded no profit to the coparceners." It will therefore be observed that the

(1) (1906) I. L. R., 29 All., 20. (2) Weekly Notes, 1906, p. 277.

circumstances of that case were exceptional. The rule appears to be, as we have stated, that a lambardar cannot of himself execute a lease of land beyond such term as the circumstances of the particular year or season may require. We therefore dismiss the appeal with costs.

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Appeal dismissed.

Before Mr Justice Sir George Knox and Mr. Justice Aikman.
SUNDAR DEO (PLAINTIFF) v. BHAGWAN DAS AND OTHERS
(DEFENDANTS).*

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*Act No. IX of 1872 (Indian Contract Act), section 178—Pawnor and pawnee—
Pawnor not owner but having a right to possession—Suit by owner for
declaration of his title.*

A person who had obtained possession of certain movable property belonging to a minor in the capacity of a trustee, and who had been allowed to retain possession of such property after the minor came of age, pawned some of it to persons who were found to have acted, negligently perhaps, but honestly and in good faith. *Held* that the pledge was valid, but the owner was entitled to a declaration of his right to redeem the articles so pawned.

THIS was a suit brought for a declaration of the plaintiff's right to redeem certain property, which had been pawned under the following circumstances. According to the plaint his grandfather left the plaintiff at the time of his death a minor and not fit to manage his affairs, and therefore he appointed Babu Kishan Dat an agent and made over all the jewelry and property to him in trust for the plaintiff. The plaintiff attained majority, but allowed the defendant to continue in possession of the aforesaid property on his behalf. He subsequently found out that a considerable portion of the property had been pawned by Kishan Dat through Lachmi Nandan, another of the respondents and brother-in-law of Kishan Dat, to the other three respondents. Kishan Dat and Lachmi Nandan were prosecuted and convicted of embezzlement with regard to the said property. The ornaments were during the criminal trial deposited in the Criminal Court. This suit was brought under the direction of that Court to declare the plaintiff's right to possession of them. The Court of first instance (Subordinate Judge of Agra gave the plaintiff a declaration that the plaintiff was entitled to redeem

* Second Appeal No. 993 of 1905 from a decree of A. B. Bruce, District Judge of Agra, dated the 25th of September 1905, confirming a decree of Shankar Lal, Subordinate Judge of Agra, dated the 20th of April 1905.

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the ornaments in dispute, with one exception, upon payment of the money which might be still due in respect of the ornaments pawned by Kishan Dat through Lachhmi Nandan, and that Kishan Dat and Lachhmi-Nandan were liable to the plaintiff for such amount as he might pay. On appeal the District Judge confirmed the decree of the first Court. The plaintiff appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave* for the appellants.

Pandit *Moti Lal Nehru* and *Lala Kedar Nath*, for the respondents.

KNOX and AIKMAN, JJ.—The appellant in this second appeal was plaintiff in the Court of first instance. According to the plaint his grandfather left the plaintiff at the time of his death a minor and not fit to manage his affairs, and therefore he appointed Babu Kishan Dat an agent and made over all the jewelry and property to him in trust for the plaintiff. The plaintiff attained majority, but allowed the defendant to continue in possession of the aforesaid property on his behalf. He subsequently found out that a considerable portion of the property had been pawned by Kishan Dat through Lachhmi Nandan, another of the respondents and brother-in-law of Kishan Dat, to the other three respondents. Kishan Dat and Lachhmi Nandan have been prosecuted and convicted of embezzlement with regard to the said property. The ornaments had during the criminal trial been deposited in the Criminal Court. This suit was brought under the direction of that Court to declare the plaintiff's right to possession of them. The Court of first instance gave the plaintiff a declaration that the plaintiff was entitled to redeem the ornaments in dispute, with one exception, upon payment of the money which might be still due in respect of the ornaments pawned by Kishan Dat through Lachhmi Nandan, and that Kishan Dat and Lachhmi Nandan were liable to the plaintiff for such amount as he might pay. On appeal the learned District Judge confirmed the decree of the first Court. He found that Kishan Dat's possession over the property was not acquired by any offence or fraud and that the pawnees acted in good faith. He applied the law as contained in section 178 of

Act No. IX of 1872. The plaintiff comes here in second appeal and contends that Kishan Dat was not in possession of the jewelry pawned within the meaning of section 178 of Act No. IX of 1872 and that neither Kishan Dat nor Lachhmi Nandan had any authority to pawn the jewelry. The case has been very ably argued by the learned advocate for the appellant and our attention has been called to several rulings. None of these is exactly on all fours with the circumstances of the present case, and there is no ruling that we can find by this Court. The section is undoubtedly a difficult one to construe, especially when taken in connection with the language of section 179 of the same Act. Having regard to the findings by the lower appellate Court we think that the case does fall within the provisions of section 178 and that the pawnees are protected by the provisions of that section. We dismiss the appeal with costs.

Appeal dismissed.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burdett.**

JANKI PRASAD SINGH (PLAINTIFF) v. BALDEO PRASAD AND OTHERS
(DEFENDANTS).*

Act No. IX of 1872 (*Indian Contract Act*), sections 69 and 70—"Person interested in the payment of money"—*Volunteer—Civil Procedure Code, section 283.*

The plaintiffs, alleging themselves to be the purchasers of the mortgagees' rights in certain land, paid the amount of a decree against the mortgagee in order to save the property from sale. But it had been already found in a suit under section 283 of the Code of Civil Procedure, that the sale to the plaintiffs was fictitious and inoperative. *Held* that the plaintiffs were not entitled to recover the amount paid as above described from their vendors. *Ram Tukul Singh v. Biseswar Lal Sahoo* (1) and *Chedi Lal v. Bhagwan Das* (2), referred to.

THE defendants in this case executed a sale deed purporting to convey to the plaintiffs their mortgagee rights in certain lands in mauza Khampar. One Bhikari Teli in execution of a money decree against the defendants attached their mortgagee interest. The plaintiffs objected in the execution department, but their

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* Second Appeal No. 1118 of 1906, from a decree of R. L. H. Clarke, District Judge of Gorakhpur, dated the 30th of August 1906, confirming a decree of Laddi Prasad, Munsif of Deoria, dated the 25th of June 1906.

(1) (1875) L. R., 2 I. A., 131. (2) (1838) I. L. R., 11 All., 234.

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objection was disallowed. They then filed a suit under section 283 of the Code of Civil Procedure, but that suit was decided against them on the finding that the sale under which they claimed was purely fictitious, and that decree became final. Notwithstanding this, the plaintiffs paid up the amount of Bhikari Tel's decree, and then brought the present suit against their vendors to recover the sum so paid. The Court of first instance (Munsif of Deoria) dismissed the suit, and this decree was in appeal affirmed by the District Judge. The plaintiff appealed to the High Court.

Mr. W. Wallach and Munshi Gulzari Lal, for the appellant.

Mr. M. L. Agarwala and Munshi Govind Prasad, for the respondent.

STANLEY, C.J., and BURKITT, J.—We think that the decision of the Courts below is correct. The plaintiff appellant has been able to establish no such relationship existing between him and the defendants as would justify the payment of the money which he now seeks to recover. It has been found by the Courts below that the assignment made to him of the mortgagee rights of the defendants was fictitious and collusive, and consequently the judgment creditors of the assignors had a right to sell those mortgagee rights in execution of their decree. We do not think that section 69 or section 70 of the Contract Act helps the appellants. As regards section 69, a party who makes a payment on behalf of another, before he can recover the amount so paid, must show that he had an interest in making the payment. Their Lordships of the Privy Council in dealing with the rights of parties making payments observed, in the case of *Ram Tuhul Singh v. Biseswar Lall Sahoo* (!):—"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt." Now in this case, in view of the facts which have been found by the Courts below, we cannot

discover that there was any obligation, either express or implied on the part of the appellant to pay the debt of the respondents. The case therefore does not fall within the purview of section 69 of the Contract Act. Nor does it fall within section 70. In the case of *Chedi Lal v. Bhagwan Das* (1), it was held by a Bench of this Court that by the use of the word "lawfully" in section 70 of the Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create, or such as would justify, the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. In his judgment Straight, J., observed:—"If the plaintiffs as mere volunteers chose to put their hands into their pockets and to pay a sum of money, not for the defendants but for themselves, that was their own look-out, and they cannot now claim the benefit of section 70." We think upon the facts, therefore, that the payment made by the appellant was a purely voluntary payment, and possibly was made, as is suggested by the Courts below, with some sinister object. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

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LACHMAN DAS (PLAINTIFF) v. ABPARKASH (DEFENDANT) *
Civil Procedure Code, section 508—Arbitration—Order of reference not fixing a period within which the award is to be made—Appeal.

Where an order of reference to arbitration made by a Court omits to fix a date for the delivery of the award, such omission is not a mere irregularity, but is a defect fatal to the order and to all subsequent proceedings founded thereon. *Chuha Mal v. Hari Ram* (2) followed. *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* (3) referred to.

IN this case after evidence had been given in a suit between the parties to this appeal and some of the issues in the case had been determined by the Court, and there remained two issues only for determination, by consent of the parties the matters in

* First Appeal No. 30 of 1906 from a decree of Chajju Mal, Subordinate Judge of Aligarh, dated the 26th of September 1905.

(1) (1888) I. L. R., 11 All., 234. (2) (1886) I. L. R., 8 All., 549,
(3) (1891) L. R., 18 I. A. 55.

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difference were left to the arbitration of two gentlemen who happened to be present in Court. The Court there and then passed an order referring the matter to arbitration, but did not, as is required by section 508 of the Code of Civil Procedure, fix a time for the delivery of the award or name the arbitrators. The arbitrators forthwith proceeded in Court, without the examination of the parties, to draw up an award, and upon the reward so drawn up, which does not deal specifically with the two issues which remained undetermined, a decree was passed. The present appeal was preferred from the decree so passed by the plaintiff in the suit.

Mr. B. E. O'Connor, Babu Durga Charan Banerji and Munshi Gulzari Lal, for the appellant.

Pandit Moti Lal Nehru and Pandit Mohan Lal Nehru, for the respondent.

STANLEY, C.J., and BURKITT, J.—The decree in this case in respect of which the appeal before us has been preferred was passed upon a so-called award. After evidence had been given and some of the issues in the case had been determined by the Court, and there remained two issues only for determination, by consent of the parties the matters in difference were left to the arbitration of two gentlemen who happened to be present in Court. The Court there and then passed an order referring the matter to arbitration, but did not, as is required by section 508, fix a time for the delivery of the award or name the arbitrators. The arbitrators forthwith proceeded in Court, without the examination of the parties, to draw up an award, and upon the award so drawn up, which does not deal specifically with the two issues which remained undetermined, a decree was passed. The main objection to the decree which was so passed is that the whole proceedings were irregular owing to the fact that the provisions of section 508 were not complied with. Other objections were also raised, with which we think it unnecessary to deal. If the only objection were in respect of the omission to fix a date for the delivery of the award, we should have been disposed to regard that as an irregularity which would be cured by the acquiescence of the parties in the preparation of the award by the arbitrators, were it not for the clear and explicit language of

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their Lordships of the Privy Council. Indeed in this Court there is a decision of a Bench that the omission in the order of the Court to fix a time for the delivery of the award would invalidate the award. This was the case of *Chuha Mal v. Hari Ram* (1). In that case Oldfield and Brodhurst, JJ., held that the law requires that there shall be an express order of the Court fixing the time for the delivery of the award, for extending or enlarging such time, and that an award which is invalid under section 521 of the Code of Civil Procedure, because not made within the period allowed by the Court, is not an award upon which the Court can pass a decree, and a decree passed in accordance with such an award is not a decree in accordance with an award from which no appeal lies. The Privy Council pronouncement to which we have referred was made in the case of *Raja Har Narain Singh v. Chaudhrai Bhagwant Kuar* (2). Lord Morris, delivering the judgment of the Board, observes :—"Their Lordships are of opinion that section 508 is not merely directory, but that it is mandatory and imperative. Section 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to their Lordships that this section would be rendered inoperative if section 508 is to be merely treated as directory." In view of the statement of the law by their Lordships we cannot but regard the proceedings taken in this suit as being obnoxious to the mandatory provisions of section 508, and accordingly we must allow the appeal. Allowing the appeal, we set aside the decree of the Court below and remand the suit to that Court under section 562 of the Code of Civil Procedure with directions that it be reinstated in its original number in the file of pending suits and be disposed of according to law. Costs here and hitherto will abide the event. Objections have been filed by the plaintiff appellant under section 561 of the Code. These objections fall to the ground in consequence of our decision on the appeal. We dismiss them, but without costs.

Appeal decreed and cause remanded.

(1) (1886) I. L. R., 8 All., 543. (2) (1891) L. R., 18 I. A.,